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Supreme Court of the United States

No. 78-643

October Term, 1978

ROCKWELL INTERNATIONAL CORPORATION,

Petitioner,

vs.

DAVID L. KIRK,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered on July 19, 1978 in the above-entitled case.

Opinions Below.

The opinion of the Court of Appeals is officially reported at 578 F.2d 814. The opinion rendered by the District Court for the Central District of California is reported at 432 F.Supp. 627. Both opinions are set forth in the appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 19, 1978 and this petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented.

1. Whether a private suit instituted pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, *et seq.* (hereinafter "Title VII") is subject to a federally-mandated statute of limitations embodied by the terms of Title VII?

2. Whether, in the absence of a federally-mandated period of limitations, a private suit instituted pursuant to Title VII is subject to the most analogous state statute of limitations?

Statutory Provision Involved.

Section 706(f)(1) of Title VII provides in pertinent part:

> "[I]f within one hundred and eighty days from the filing of [a] charge . . . the Commission has not filed a civil action under this section . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . ."
>
> Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1).

Statement of Case.

On or about April 27, 1971, respondent, David L. Kirk, filed a charge of employment discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") against his employer, Rockwell International Corporation (hereinafter "Rockwell"). The charge alleged that on or about February 15, 1971, Kirk had been demoted from the position of Material Review Engineer to Material Review Inspector solely on the basis of his race, Caucasian.

On or about May 6, 1971, Kirk received notice from the EEOC that his charge had been referred to the California Fair Employment Practice Commission (hereinafter "FEPC") for investigation. On or about May 26, 1971, the FEPC declined to proceed, at which time the EEOC assumed jurisdiction.

On or about August 17, 1976, Kirk received a letter from the EEOC notifying him that it had not found reasonable cause to believe that his charge was true and that he had the right to file suit within ninety (90) days after receipt of the letter.

On November 11, 1976, Kirk instituted the present action against Rockwell in the United States District Court, Central District of California. When this federal action was filed, over five and one-half years had passed since Kirk had first filed his charge with the EEOC.

Accordingly, the district court dismissed the plaintiff's complaint, holding that (1) state statutes of limitations are applicable to Title VII; and that (2) the state statute of limitations period is not to be tolled during the EEOC's processing of an employment discrimination charge. The court specifically held that plaintiff's action was barred by either California's one-year period applicable to tort liability (Section 340(3) of the California Code of Civil Procedure) or its three-year period applicable to actions based upon liability created by a statute (Section 338(1) of the California Code of Civil Procedure).

On July 19, 1978, the Court of Appeals for the Ninth Circuit reversed the decision of the lower court, holding that no state statute of limitations was applicable to Title VII, since Congress provided time limits

for filing a charge and giving notice to the employer. The Court viewed these limits as a congressionally established statute of limitations.

REASONS FOR GRANTING THE WRIT.

I

This Case Is an Excellent Example of an Important and Recurring Problem Specifically Left Unresolved by the Supreme Court in Occidental Life Ins. Co. v. EEOC: The Absence of a Conventional Statute of Limitations in Private Title VII Actions.

This case raises an issue of fundamental importance to the administration of Title VII; namely, whether *private* Title VII actions are subject to any overall, conventional statute of limitations. This specific issue was expressly left open by the Supreme Court in the decision in *Occidental Life Ins. Co. v. EEOC* (1977), 432 U.S. 355, 368, when it stated "[u]nlike the typical litigant against whom a statute of limitations might appropriately run . . . ."

In this case, plaintiff did not sue until over five and one-half years after the alleged violation. Respondent Kirk could have requested a notice of right to sue from the EEOC and instituted this lawsuit at any time after 180 days after the filing of the charge with the EEOC. Kirk's failure to do so for over five and one-half years must result in the dismissal of his Title VII action.

This case is not unique. It is an excellent example of an acute danger to the continuing efficacy of Title VII and the federal courts. An enormous backlog of employment discrimination charges threatens to inundate the courts. Many of these charges are several years old—stale by any judicial standard applicable to any other federal cause of action. The following table graphically illustrates the problem:

EEOC CASES
1970—1977

Fiscal Year	Charges Received	Charges Resolved	Increase in Backlog	Cumulative Backlog
1970	14232	5967	8267	24509
1971	22920	11497	11423	35932
1972	33068	9802	23266	59198
1973	48735	20225	28510	87708
1974	54228	37537	16691	104399
1975	64542	62298	2224	106643
1976*	97764	82537	15227	121870
1977	79311	63847	15464	137336

*Fiscal Year 1976 was 15 months long, due to a change in the beginning and ending date of fiscal years.

II

The Absence of a Statute of Limitations Respecting Federal Court Actions Under Title VII Has Fostered and Encouraged the Inefficiency of the EEOC, Causing the Crisis in the Administration of Title VII.

In 1972, when Congress reviewed and overhauled the entire enforcement mechanism of Title VII, the dimensions of the EEOC's failure to perform the contemplated functions of investigation and conciliation was already manifest.

The provisions of Section 706(f)(1) requiring a notice of right to sue after 180 days—and the expansion of time for EEOC processing—were one response to this growing backlog.

Unfortunately, the tendency of courts to overlook the mandate that the EEOC "shall" notify a claimant of the right to sue after 180 days—and the absence of any other statute of limitations—has only served

to aggravate the immense and growing problem which Congress had attempted to alleviate in 1972.

By judicial interpretation, no real time limits have been established which force a prospective litigant to the choice of whether to sue in federal court. As a result, the EEOC has become a law enforcement agency unique in the annals of history. Without any time limits whatsoever, the EEOC has fallen into the trap of believing that it has unlimited resources with which to handle every claim as thoroughly and as completely as every other claim. In short, the EEOC has been seduced into believing that it need not exercise any sort of prosecutorial or administrative discretion in the processing of the EEOC's claims. Again, in the absence of time constraints, the agency has begun to believe that eventually it will have the opportunity, the energy, and the time to process each and every complaint which is left to slumber in its files.

The effect of this process is the precise opposite of the purpose of Congress when Title VII was adopted in 1964 and amended in 1972. The expectation was that the opportunity for conciliation would be limited, followed by a defined opportunity for the prospective litigant to make a timely choice of whether to pursue a judicial remedy in federal court.

The causal effect is natural and indisputable: first, the courts were reluctant to establish time limits on EEOC processes; second, the EEOC, like any human institution, avoided unnecessary choices and delayed action on all claims left to its jurisdiction; third, prospective claimants, uninformed as to their rights, unwilling to make the decisions which might foreclose options and opportunities failed to move in an expeditious

manner to bring their claims to the attention of federal courts. The inevitable result has been the inundation of federal courts with old claims, and a lengthy list of problems which should have been resolved expeditiously in the interest of preserving employment relationships and administering Title VII.

III

A Statute of Limitations Is Appropriate for All Private Civil Rights Actions, Including Those Brought Under Title VII.

The essential purpose of a statute of limitations is to cut off stale claims—claims which have not become the subject of a lawsuit within a specified time period. Accordingly, private Title VII claimants must not be permitted to bring actions after the passage of several years when the claim has become stale. If this situation continues to develop, great prejudice to defendants and enormous burdens on federal courts will be the inevitable result.

Periods of limitations have long been recognized as an essential part of our judicial system. Established precedents, sound principles of public policy and equity, and congressional intent in drafting the 1972 amendments to the Civil Rights Act of 1964 compel recognition and application of overall periods of limitations for *private* Title VII actions. Accordingly, the decision of the court of appeals must be reversed.

The necessity for having statutes of limitations to cut off stale claims has been recognized as an essential part of the jurisprudence of this nation since its founding. As recognized by Chief Justice John Marshall in *Adams v. Woods* (1805), 6 U.S. (2 Cranch) 336, 343:

> "[The absence of a period of limitations] would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain for ever liable to a pecuniary forfeiture."

More recently, in its decision in *Johnson v. Railway Express Agency, Inc.* (1975), 421 U.S. 454, the Supreme Court dealt specifically with the applicability of statutes of limitations to private civil rights actions. In holding that there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law," (421 U.S. at 464) the Supreme Court dealt specifically with the purpose and function of statutes of limitations as restricting the overall period of time between the acts allegedly giving rise to a claim and the time when suit may be brought upon the claim. Thus, as stated by the majority of the Supreme Court in *Johnson v. Railway Express Agency, Inc.*:

> "Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."
>
> 421 U.S. at 463-64.

And even the separate opinions of the Justices who dissented in part recognized the purpose and value of such an overall period of limitation:

> "Statutes of limitations are designed to insure fairness to defendants by preventing the revival of

> stale claims in which the defense is hampered by lost evidence, faded memories, and disappearing witnesses, and to avoid unfair surprise."
>
> 421 U.S. at 473.

The reasons for a statute of limitations are equally applicable since Title VII simply represents an alternative federal approach in the civil rights area. The interests of society and of potential defendants in preventing the litigation of stale claims under Title VII is precisely identical to the interests of society and potential defendants in preventing the litigation of stale claims under Section 1981.

In *Johnson v. Railway Express Agency, Inc.*, this Court rejected the argument that the filing of an EEOC charge provides a respondent the same notice as the filing of a suit and therefore serves the same purpose as compliance with a period of limitations. Only where there had been (i) a prior "[judicial] filing," which (ii) had raised "exactly the same cause of action" is there proper notice of an actual attempt to invoke the authority of a federal court. 421 U.S. at 467. Obviously, when these two conditions are met, a respondent has not only been put on notice of the charges being made against him but also through discovery in the first action can take steps to secure and preserve for trial evidence favorable to his cause. Under such circumstances, the prior action does avoid the evil against which the statute of limitations was designed to protect. But no similar circumstances exist with regard to EEOC charges. The investigative nature of the EEOC's responsibility makes discovery of information from the charging party and preservation of testimony in an admissible form impossible. Thus, just

as the filing of a charge with the EEOC did not avoid the evils against which the statutes of limitations were designed to protect in a Section 1981 civil rights action, so the filing of the charge by appellant, or any other Title VII claimant, would not avoid the evils against which a period of limitations is designed to protect in a private Title VII action. In both cases, the evils are the same—"the loss of evidence, the disappearance and fading memories of witnesses, and the unfair surprise that could result from a sudden revival of a claim that long has been allowed to slumber"—and in both cases the overriding interest of the federal courts in avoiding these evils requires that any state statute of limitations be applied in such a way that it is not swallowed up and rendered useless by the state's tolling principles. Indeed, this overriding federal interest requires that *all* claims to be litigated in federal court, specifically including civil rights claims, be subject to some overall period of limitations to bar the prosecution of stale claims such as that presented for resolution here. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 462.

A. A Statute of Limitations Serves Not Only the Objectives of Fair Trial; It Would Also Facilitate Compliance With Title VII and Preservation of Employment Relationships.

As with all statutes of limitations, one interest of a potential defendant is the preservation of rights and evidence as a litigant. Indeed, the conventional justification for a statute of limitations remains applicable to civil rights cases. If claims are allowed to slumber, and the commencement of a lawsuit is delayed, both plaintiffs and defendants may often be denied the opportunity for fair trial. When witnesses become unavailable,

memories dim, and evidence is lost, all parties become subject to the vagaries of a judicial system which has been denied the basic means for making a rational decision.

However, the special character of Title VII cases involves another unique reason for expeditious resolution of claims.

Employment relationships are necessarily close. Careers are ongoing, organic and not easily remedied if interrupted for too long a time. When employees consider their options under Title VII, one option is always compromise and settlement. Frequently, compelling reasons exist for decisions to get on with the business of working and to seek conciliation and resolution of disputes more promptly than the EEOC. The absence of time limits, the delay of EEOC conciliation, and the delay of a lawsuit often postpone these choices and unnecessarily disrupt employment relationships which have not been severed, only strained. In other words, the necessity for speedy resolution of employment discrimination lawsuits inheres in the nature of the employment relationship. Virtually every unresolved dispute represents a misunderstanding, a festering wound, an unnecessary handicap on both employer and employee—a handicap which obstructs the employee from continuing with a career and the employer from taking care of business.

The long range interest of all employers is in the effective implementation of personnel policies which comply with Title VII. The prolongation of disputes arising from personnel policies, multiplied and aggravated by additional claims, serves only to cloud and obstruct the path toward compliance. The inability to

resolve these disputes not only diverts time, attention and emotional energy, it also prevents the acquisition of data necessary for compliance: the results and resolutions from which personnel policies can be scrutinized and adjusted.

The indisputable lesson of the congressional debates incident to the 1972 amendments to Title VII is that Congress desired quick resolution of employment discrimination claims. The national legislature understood that quick resolution of claims was in the interest of both employers and employees. That interest need not only be defined in terms of litigation. It is an interest which is related to the day-to-day operation of a business, the employment relationship, and the necessity for resolving the problems which often become more serious, a source of vexation and resentment with the passage of unnecessary time.

B. The Portions of Title VII Relied Upon by the Court of Appeals as Establishing a Statute of Limitations Do Not Perform the Essential Function of a Statute of Limitations: Foreclosing Litigation of Stale Claims.

The alleged internal Title VII statute of limitations—the 180/300-day period for filing a charge with the EEOC and the 90-day period to file suit after notice from the EEOC—meets none of these purposes, as this case so aptly demonstrates, since these periods do not either singly or jointly provide an overall period of limitations. Here, for example, no action was brought by Kirk until over five and one-half years after his allegedly discriminatory demotion, and the trial, if any, in this matter will not occur until more than eight or nine years thereafter. Surely, after such periods of time the defendant will be severely prejudiced

through the loss of evidence, the unavailability of witnesses, and the fading and distorting of memories. Indeed, as the Ninth Circuit recognized in a different context with regard to virtually identical delays in a private Title VII action:

> "[I]t cannot be presumed that appellee has not been prejudiced because of the delay. . . . Certainly, memories have dimmed and one of appellee's witnesses has died."
>
> *Cleveland v. Douglas Aircraft Company* (9th Cir. 1975), 509 F.2d 1027, 1030.

It is thus apparent that the portions of Title VII relied upon by the Court of Appeals serve neither to establish an overall period of limitations, nor to cut off stale claims. Therefore, they do not constitute a statute of limitations.

C. The Application of an Overall Period of Limitations Would Facilitate, Not Frustrate, Congressional Intent.

Dissatisfied with the way Title VII had been working, Congress in 1971 and 1972 undertook a review of Title VII as it had been enacted in 1964 and of alternative enforcement procedures. The whole thrust of the congressional debate with regard to the 1972 amendments was to insure the expeditious handling of Title VII claims in order to promote the interests of the public and protect the rights of both claimants and respondents. Thus, for example, Congressman Quie, the ranking minority member of the House Committee on Education and Labor, noted that virtually all members of the committee agreed on the need for giving enforcement powers to the EEOC:

> "[D]isagreement arose *only* as to which method of enforcement would be not only most effective

> but, *expeditious, fair and equitable as well.*" [Emphasis added]
>
> 1972 LEG. HIST. 200; House Debate, September 15, 1971.[1]

Similarly, Senator Dominick, who served as the principal senatorial spokesman concerning the meaning and merits of the court enforcement bill which was eventually enacted, explained during the floor debate:

> "I do not care who it may be, or how long they may have been claiming discrimination, *if they have to wait 20 months before they even find out whether or not the Commission feels that the charge is valid, all one can say is that justice delayed is justice denied.*" [Emphasis added]
>
> 1972 LEG. HIST. 677, Senate Debate, January 20, 1972.

In short, the thrust of the 1972 amendments was to insure more expeditious resolution of Title VII disputes. As Senator Dominick stated in favoring court litigation over cease and desist authority for the EEOC:

> "Although cease and desist promises much, a shiny new administrative procedure designed to redress grievances is no better than its performance, and *if it requires 2 to 3 years to achieve justice, its potential is nothing but a frustrating promise of what might have been.*" [Emphasis added]
>
> 1972 LEG. HIST. 795, Senate Debate, January 24, 1972.

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[1]The legislative history of the 1972 amendments has been compiled and published in *Senate Subcommittee On Labor Of The Committee On Labor And Public Welfare*, 92d Cong., 2d Sess., *Legislative History Of The Equal Employment Opportunity Act Of 1972* (Comm. Print 1972) [hereinafter cited as 1972 LEG. HIST.].

The Senator was not speaking of 2 to 3 years to compiete the EEOC's investigation as taking too long; but of *2 to 3 years to complete the total adjudication as being too long.*

Moreover, expeditious litigation was not sought only for the sake of the claimants. Congress fully recognized the interests of employers. Thus, Congressman Perkins, the ranking Representative to the joint Senate-House Conference Committee with regard to the 1972 amendments, explained the results of the conference as follows:

> "The conference resulted in legislation that will provide fair and effective enforcement of the equal employment provisions of the Civil Rights Act. The conference report provides a mechanism and a procedure that will, I am certain, prove to be both fair and effective, *one which will protect the rights of both the employer and the employee.*
>
> "The conferees spent considerable time dealing with the detailed provisions covering the procedure for filing and processing charges of discrimination brought by individuals who feel they have been unfairly treated because of their race or their sex. An effort was made to insure a 'speedy and an *equitable* resolution of such charges which *is in the interest* of both the employee and the *respondent employer or labor union.*' " [Emphasis added]
>
> 1972 LEG. HIST. 1855-56, House Debate, March 8, 1972.

Again and again in the preceding debates, the same point had been stressed. In the words of Senator Dominick:

> "This amendment *protects the rights* of both respondents and aggrieved *by providing* a fair, effective, and expeditious resolution of the dispute. . . . As I pointed out, effective protection of the *rights of* both the *employer* and the employee *demands a speedy resolution of the dispute.*" [Emphasis added]
>
> 1972 LEG. HIST. 695-96, Senate Debate, January 21, 1972.

Senator Fannin agreed:

> "In addition court enforcement offers a more expeditious settlement, and a *speedy resolution is vitally important* to both an aggrieved employee and *to a respondent employer.*" [Emphasis added]
>
> 1972 LEG. HIST. 699, Senate Debate, January 21, 1972.

These statements by those in the forefront of both the House and Senate debates over the 1972 amendments to the Civil Rights Act demonstrate the congressional desire for expeditious resolution of claims in order to insure fairness to both respondents and claimants. In light of this consistent desire, the application of an overall period of limitations would effectuate congressional intent. Indeed, congressional intent would be totally frustrated and offended by the open-ended enforcement proceedings which would permit an EEOC charge to lie dormant for four, five, ten, twenty or more years, only to erupt into federal court litigation at a time when memories have faded or become distorted, witnesses have become unavailable by death or otherwise, and fair trial has been rendered impossible. The policies of expeditious and fair resolution which were foremost in the minds of Congress require the

application of an overall period of limitation in order to effectuate these goals.

IV

Occidental Life Ins. Co. v. EEOC Established Only a Narrow Exception to the General Principle That a Conventional Statute of Limitations Is Applicable to All Federal Causes of Action.

The Supreme Court in *Occidental Life Ins. Co. v. EEOC* (1977), 432 U.S. 355, held, *inter alia*, that (1) no limitation has been imposed upon the EEOC's failure to file suit in federal court, and that (2) EEOC enforcement actions are not subject to state statutes of limitations.

Occidental does not support the decision of the court of appeals for one very simple reason: *the holding applies only to cases in which the EEOC is plaintiff, and not to cases initiated by private litigants.* The Supreme Court held that although a congressional intent to apply a local limitations period has been reserved in instances where a federal statute creating a cause of action fails to specify such a period, state limitations periods will not be borrowed if their application would not comport with the federal statute's underlying policies.

In the instant case, the federal statute's underlying policies, as they pertain to this case, can be stated rather succinctly. The federal policy requires "employment discrimination claims to be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in a federal court . . . ." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. at 368. In other words, the EEOC is charged with investigating employment discrimination claims and settling them

by informal conciliation, if possible, and *it is required to refrain from suing until it has discharged its administrative responsibilities.* Since the EEOC is required to refrain from suing until it has discharged its administrative responsibilities, the Supreme Court held that the application of state statutes of limitations would not comport with the federal statute's underlying policies, since the state statute of limitations may very well have run before the administrative process has been completed.

However, private litigants in Title VII actions are not required to refrain from suing until the EEOC has discharged its administrative responsibilities. The private litigant is not charged with investigating employment discrimination claims and settling them by informal conciliation, if possible, as is the EEOC. This distinction is absolutely critical.

Any claimant must decide whether to pursue a judicial remedy or to rely on the administrative process. This was the result of the 1972 amendments to Title VII. If no limitations period is established, the claimant is never required to make any such choice until after the administrative process is completed—an increasingly long period of time. In short, application of a statute of limitations would be consistent with the need for expeditious processing of cases: it would avoid the interminable languishing of discrimination claims in the EEOC, while claimants delay making the decision contemplated by Section 706(f)(1) as amended in 1972.

This Court has already recognized the problem and drawn the distinction when it stated in *Occidental:*

> "Unlike the typical litigant against whom a statute of limitations might appropriately run, the EEOC

is required by law to refrain from commencing a civil action until it has discharged its administrative duties."

Occidental Life Ins. Co. v. EEOC, 432 U.S. at 368.

The importance of the distinction between the EEOC and the private plaintiff was emphasized by this Court:

"If a complainant is dissatisfied with the progress the EEOC is making on his or her charge of employment discrimination, he or she *may elect* to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court." [Emphasis added]

432 U.S. at 361.

This Court went on to state:

"The Committee Report clearly explained that the purpose of this provision was to afford an aggrieved person the *option* of withdrawing his case from the EEOC if he was dissatisfied with the rate at which his charge was being processed:

" 'In the case of the Commission, the burgeoning workload, accompanied by insufficient funds and a shortage of staff, has, in many instances, forced a party to wait 2 to 3 years before final conciliation procedures can be instituted. This situation leads the committee to believe that the private right of action, both under the present Act and in the bill, provides the aggrieved party a means by which he may be able to escape from the administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process.' [Footnote omitted]

* * * *

"As in the House, both the original and substitute Senate bills authorized complainants dissatisfied with the pace of EEOC proceedings to bring individual lawsuits after 180 days. [Footnote omitted] And, as in the House, the Senate Committee explained that such a provision was necessary because the heavy caseload of the EEOC could result in delays unacceptable to aggrieved persons:

" 'As indicated in testimony, [the EEOC] caseload has increased at a rate which surpasses its own projections. The result has been increasing backlogs in making determinations, and the possibility of occasional hasty decisions, made under the press of time, which have unfairly prejudiced complaints. Accordingly, where the Commission is not able to pursue a complaint with satisfactory speed, or enters into an agreement which is not acceptable to the aggrieved party, the bill provides that the individual shall have an opportunity to seek his own remedy, even though he may have originally submitted his charge to the Commission.' " [Footnote omitted; emphasis added]

Occidental Life Ins. Co. v. EEOC, 432 U.S. at 362-63.

The very essence of, and reasons for, a period of limitations for private litigants, but not the EEOC, is best articulated by Judge Williams in *Clayton v. McDonnell Douglas Corp.* (C.D.Cal. 1976), 419 F. Supp. 28, 29:

"There could be sound reasons to free EEOC from limitation strictures of which a private plain-

tiff should not get the benefit. First, EEOC is a federal agency operating in all the states, and great confusion could come from subjecting its operations to the differing limitations statutes in the various states. Secondly, successful relief gained through litigation wherein the agency is plaintiff promotes public policy which benefits many citizens. Lastly, it may be a recognition of the troubles an agency with a small staff and a large backlog of cases has in processing complaints speedily.

"These are not factors which are relevant to a private party action and the law has always discouraged the filing of stale claims. Fairness dictates that an employer be told within a reasonable time after the act, that a disgruntled former employee is going to take him to court. Otherwise, if the worker is allowed to wait several years before he files his suit, the defendant might have lost contact with witnesses valuable to him, and pertinent personnel and other records in his possession may be destroyed. There is simply no valid reason for not requiring a private party to file his action within, say, a three year period."

V

Several Alternative Periods of Limitations Are Consistent With the Congressional Policy Embodied in Title VII.

A. Congress Intended to Require a Private Claimant to Choose Whether to Bring Suit Within a Period Which Cannot Be Greater Than 570 Days.

In 1972, when Congress reviewed Title VII, the entire enforcement procedures of Title VII were overhauled with new and more realistic time limits mandated

for each stage. The time within which to file charges was increased from 90/210 days to 180/300 days. The time period within which it was provided that the EEOC "shall" give notice to claimant was extended from a maximum of 60 days to 180 days. The time period within which to bring suit following notice from the EEOC was extended from 30 days to 90 days.

By extending the time within which the EEOC was to give notice to a claimant *and* by retaining the mandatory "shall", Congress manifested its intent that such period was to be mandatory. Otherwise, why would Congress extend the period? And why else would it use the word "shall" which was clearly understood by the leaders of the 1972 amendment debates as being mandatory?[2] Clearly these two factors alone compel the conclusion that Congress intended the 180-day period to be mandatory.

But these two factors are not the only guides to congressional intent. Congress demonstrated that it knew the difference between directory and mandatory periods when it added the following new sentence to Title VII:

> "The Commission shall make its determination on reasonable cause *as promptly as possible* and, *so far as practicable*, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge." [Emphasis added]
>
> Section 706(b), 42 U.S.C. §2000e-5(b).

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[2]See, e.g., the discussion between Senators Dominick and Javits on whether Title VII should say that the EEOC "shall" or "may" file suit after 30 days. 1972 LEG. HIST. 892-894.

Thus, when Congress intended only to give direction without mandate, it did so in unmistakable terms.

The conclusion that Congress intended the 180-day period to be mandatory is further strengthened by the final sentence of Section 706(f)(1) which provides that after suit has been filed:

> "Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or *further efforts of the Commission to obtain voluntary compliance.*" [Emphasis added]
>
> Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1).

Congress thus clearly anticipated that there would be instances when compliance had not been secured by the time suit would have had to be brought pursuant to the time limits specified in the Act. The solution in such cases was not, however, to delay the giving of notice and the bringing of the suit. Rather, the congressionally-prescribed solution was for suit to be brought in accordance with the time limits specified and then to seek a stay of further proceedings from the court, during which time the EEOC could complete its effort to obtain voluntary compliance. The importance which Congress attached to such expedition is further demonstrated by the fact that the stay to be granted by the court was to last no more than 60 days.

Thus, while congressional intent with regard to the 1964 Act may have been unclear, the congressional intent with regard to the Act as amended in 1972 is not.

Title VII as amended in 1972 should now be interpreted as requiring the filing of a charge within the 180/300 day-period, the giving of notice by the EEOC within 180 days if it has not instituted action itself or otherwise resolved the charge, and the filing of suit by a private claimant within an additional period of 90 days. Such an interpretation is not only consistent with the language and legislative history of the 1972 amendments, it is the only interpretation which is so consistent. Moreover, such an interpretation will insure that the interests of the complaining parties, respondents, and the public will be protected and promoted by putting an end to the interminable delays which to date have surely demonstrated the aptness of the maxim "justice delayed is justice denied."

As so interpreted, Title VII would actually provide a uniform, overall congressionally-mandated period of limitations as apparently sought by plaintiff and the EEOC. A maximum of 570 days (300 days plus 180 days plus 90 days) would thus be allowed between the time when the alleged acts of discrimination occurred and the date when a private suit with regard to such allegations would have to be brought. Plaintiff's present action, having been brought five and one-half years after his allegedly discriminatory demotion, would be time barred.

B. If Congress Has Not Provided a Statute of Limitations, the Most Analogous State Statute of Limitations Must Be Applied.

In the absence of an explicit federal statute of limitations, federal courts apply the most appropriate statute of limitations from the state in which the cause of action arose. In *Johnson v. Railway Express Agency*

(1975), 421 U.S. 454, the Court stated this principle of federal law:

> "Since there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action under § 1981, the controlling period would ordinarily be the most appropriate one provided by state law. See *O'Sullivan v. Felix*, 233 U. S. 318 (1914) (Civil Rights Act of 1871); *Auto Workers v. Hoosier Corp.*, 383 U. S. 696, 701-704 (1966) (Labor Management Relations Act); *Cope v. Anderson*, 331 U. S. 461 (1947) (National Bank Act); *Chattanooga Foundry v. Atlanta*, 203 U. S. 390 (1906) (Sherman Act); *Campbell v. Haverhill*, 155 U. S. 610 (1895) (Patent Act)."
>
> 421 U.S. at 462.

C. Overriding Considerations of Federal Policy Preclude, in Any Event, the Operation of Any Tolling Principles Which Effectively Leave Private Title VII Actions Without Any Overall Period of Limitations.

If the applicable California statute of limitations were tolled during the entire and indefinite period when a claimant's charge is pending before the EEOC, the purpose of an overall period of limitations would be thwarted. If the EEOC did not issue a 90-day letter on its own, and if the claimant did not exercise his right to demand one, the charge could be pending before the EEOC almost indefinitely only to explode upon the courts and the respondent as a lawsuit at some distant time in the future. In such a situation, infinity plus 90 days would become the only period of "limitation" despite the "application" of the applicable state statute of limitations.

This result would be impermissible. "Considerations of state law may be displaced where their application would be inconsistent with federal policy . . . ." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 465. Here, just such an inconsistency would result if a state law tolling principle were applied in such a way as to totally eliminate any overall period of limitations.

Moreover, it is particularly important that the exception of tolling not be permitted to swallow the rule that there be an overall period of limitations, since the application of this rule is absolutely essential to effectuate the congressional mandate which requires that Title VII claims be resolved expeditiously in order to protect the interest of *claimants and respondents* and to ensure the fair and effective administration of justice which requires barring stale claims from the courts. No one would argue that it was Congress' intent to allow the prosecution of stale claims; yet that will be the precise result if the overall period of limitations is to be tolled.

Indeed, this Court expressly refused to make an exception to these important policies by refusing to toll the applicable period of limitations with regard to a civil rights claim under Section 1981 during the pendency of a similar charge before the EEOC. *Johnson v. Railway Express Agency, Inc., supra.*

Conclusion.

In effect, the Ninth Circuit has held that no conventional, overall statute of limitations applies to federal court actions under Title VII. This determination will frustrate the congressional intent that discrimination cases be processed expeditiously. If the general principle requiring application of a limitations period to all federal causes of action is to be ignored in Title VII cases, this Court should make that decision. A definitive resolution of this issue is of paramount importance to the administration of Title VII.

Petitioner respectfully submits that this Petition for Certiorari should be granted.

Dated: October 16, 1978.

Respectfully submitted,

STEPHEN E. TALLENT,
Attorney for Petitioner.

CHARLES E. HART 3d,
ROBERT N. KOHN,
DAVID J. SHAPIRO.

APPENDIX A.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

David L. Kirk, Plaintiff-Appellant, vs. Rockwell International Corporation, Defendant-Appellee. No. 77-2640.

Filed: July 19, 1978.

Appeal from the United States District Court for the Central District of California.

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and SOLOMON,* District Judge.

SOLOMON, District Judge.

Appellant, David L. Kirk, a white male, brought this action against his employer, Rockwell International Corporation (Rockwell) for the violation of his civil rights. Appellant asserts that Rockwell discriminated against him on account of his race in violation of Title VII of the Civil Rights Act of 1964[1] and the Civil Rights Act of 1866.[2] The District Court granted

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*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]42 U.S.C. §2000e et seq. (1970 and Supp. V). 42 U.S.C. §2000e-2 (1970) provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . ."

[2]42 U.S.C. §1981 (1970). Section 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws . . . for the security of persons and property . . . as is enjoyed by white citizens . . ."

Rockwell's motion to dismiss the action on the ground that the claims were time-barred.

This appeal raises two issues: (1) whether a state statute of limitations applies to private actions under Title VII, and (2) whether *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), has retroactive application.

I) *Facts*

In his complaint, appellant alleges that in 1949 he was employed by Rockwell in California as a Radio and Radar Mechanic. Eventually, Rockwell promoted him to Material Review Engineer, but, in February, 1971, Rockwell demoted him to Inspector.

On or about April 27, 1971 appellant filed a charge with the Equal Employment Opportunity Commission (EEOC). He alleged that Rockwell, when it reduced its staff, systematically demoted whites on the basis of race,[3] and that appellant was a victim of this discriminatory employment practice.

The EEOC referred the charge to the California Fair Employment Practices Commission (FEPC). On about May 26, 1971, the FEPC declined to proceed, and the EEOC assumed jurisdiction of the charge.

On March 30, 1972 the EEOC sent a "Notice of Charge of Employment Discrimination" to Rockwell. Without disclosing appellant's name, the Notice informed Rockwell that it had been charged with discriminating against its employees on the basis of race in

[3]Appellant alleged in the charge:

"Under the specific circumstances now existing (the large reduction in the work force over an extended period of time) it is an extreme discrimination to remove long time qualified employees to replace them with 'minority' people who must be trained to qualify."

"wages, demotion, seniority, qualification/testing, benefits, terms and conditions." The Notice informed Rockwell of the date and place of the violation and included this statement:

> "No action on your part is necessary at this time . . . *Section 1602.14 of the Commission's Regulations requires the preservation of all relevant personnel records until this charge is resolved.*" (emphasis added).

Beginning in 1971, appellant made many inquiries on the status of his charge against Rockwell. Not until August 5, 1976 did he learn that he could demand a "Right to Sue Letter" from the EEOC. On August 17, 1976 he received a "Right to Sue Letter" from the EEOC. This was more than 5 years after the date the charge was filed.

The letter notified appellant that the EEOC had not found reasonable cause to believe his charge of discrimination by Rockwell; but, if Kirk wanted to pursue the charge and bring an action against Rockwell, he would have to bring it within 90 days, or he would forfeit his Title VII claim.

Appellant then retained counsel and filed an action within 90 days after he received the letter. In his complaint appellant sought relief under Title VII, and, in a separate count, under 42 U.S.C. §1981.

Rockwell moved to dismiss the action for failure to state a claim. Rockwell argued that appellant's claims under Title VII and §1981 were barred by California's statute of limitations.

Rockwell asserts that the longest applicable California statute of limitations is 3 years and that appellant's action filed more than 5 years after the discrimina-

tory act is therefore barred. Rockwell relied on the rule that a federal cause of action for which Congress did not provide a period of limitations borrows the relevant state statute of limitations. E.g., *Runyon v. McCrary*, 427 U.S. 160, 179-181 (1976).

The District Court agreed with Rockwell and dismissed the action.

II) *The Title VII Period of Limitations*

Appellant contends that the filing and notice requirements of Title VII constitute a built-in period of limitations, so that it is unnecessary to borrow a state statute. Appellant also asserts that borrowing a state statute of limitations is inappropriate here because it would interfere with the federal policy, expressed in Title VII, of encouraging an aggrieved party to pursue administrative conciliation.

(A)

Title VII was enacted as part of the Civil Rights Act of 1964.[4] Title VII prohibited racial discrimination in employment and established procedures for enforcement of this prohibition.

As enacted, Title VII required an aggrieved party to file his charge of discrimination with the EEOC within 90 days of the discriminatory act.[5] The EEOC was required to notify the employer of the charge[6] and was also required to attempt to conciliate the

[4]Pub.L. No. 88-352, 78 Stat. 241.

[5]Section 706(d), 78 Stat. 260. If the aggrieved party first filed a charge with a state employment discrimination agency, he had to file his charge with the EEOC within 30 days of receipt of notice that the State agency had ended its proceedings, or within 210 days of the discriminatory act, whichever was earlier.

[6]Section 706(a), 78 Stat. 259.

grievance within 30 days.[7] The 30-day requirement was not mandatory; it was only directory. *Cunningham v. Litton Industries,* 413 F.2d 887, 890 (9th Cir. 1969).

If, after the 30 days, the EEOC determined that conciliation was unlikely, it was required to notify the aggrieved party. The aggrieved party then had 30 days to file an action.[8] However, the 30-day period did not begin to run until the aggrieved party received a "Right to Sue Letter", which informed him of his rights. *Cunningham v. Litton Industries, supra,* at 890-891.

(B)

The legislative history of the 1964 Act shows that the requirement of filing a charge within 90 days of the discriminatory act was intended to serve as a statute of limitations.

In 1964, the House Judiciary Committee favorably reported the bill[9] which became the Civil Rights Act of 1964. Section 707(d) of the bill provided:

> "No civil action (by an aggrieved party) shall be based on an unlawful employment practice occurring more than six months prior to the filing of the charge with the Commission and the giving of notice thereof to the respondent, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the Armed Forces, in which event a period of military service shall not be included in computing the six-month period."

[7]Section 706(e), 78 Stat. 260.

[8]*Id.*

[9]H.R. 7152, 88th Cong., 2nd Sess. (1964).

The bill also provided for a private action if the aggrieved party obtained permission from the EEOC, and required the EEOC to give notice of the charge to the employer.

The House approved the bill, and it was submitted to the Senate.

Senators Clark and Case, floor managers of Title VII of the bill, explained the filing requirement to the Senate:

> "The suit . . . would have to be based on an unlawful employment practice occurring within 6 months prior to the filing of the charge with the Commission . . . *This limitation will avoid the pressing of stale claims.*" 110 Cong. Rec. 7213 (1964) (emphasis added).

Senators Clark and Case then participated[10] in drafting the amended version of the bill, which required the aggrieved party to file his charge within 90 days of the discriminatory act, and to file his action within 30 days of notice from the EEOC.[11] Senator Humphrey, who also participated in the drafting of the final version of the Civil Rights Act of 1964, described the requirement that the charge be filed within 90 days of the discriminatory act as a "period of limitations." 110 Cong. Rec. 12723 (1964).

(C)

In 1972, Title VII was amended by the Equal Employment Opportunity Act of 1972.[12] Congress made the amendments apply to all charges, including charges which were pending before the EEOC on the effective

[10]110 Cong. Rec. 12707 (1964).

[11]110 Cong. Rec. 12813-12814 (1964).

[12]Pub.L. No. 92-261, 86 Stat. 103.

date, March 24, 1972, of the amendments. *See Inda v. United Air Lines,* 565 F.2d 554, 560 (9th Cir. 1977).

Unlike the 1964 Act, the amendments gave the EEOC the power to bring an enforcement action. The amendments also extended the time to file a charge of employment discrimination from 90 to 180 days,[13] and specified that the EEOC shall give notice of the charge to the employer within 10 days of the date the charge was filed.[14] The 1964 Act had not specified when the EEOC had to notify the employer.

Congressman Erlenborn, who sponsored the 1972 amendments in the House explained to his colleagues that the specific time limit was for the purpose of:

> ". . . giving notice to the party charged (so) that he would have an opportunity to gather and preserve the evidence . . ." 117 Cong. Rec. 31972 (1971).

In *Occidental Life Insurance Co. v. EEOC,* 432 U.S. 335 (1977), the Supreme Court held that state statutes of limitations do not apply to EEOC enforcement actions. The Court permitted the EEOC to bring an action more than 3 years after receipt of the charge. The Court said that the initial filing requirement, and the requirement that the EEOC notify the employer of the charge, were intended by Congress to function as a statute of limitations.

[13]Section 706(e), 42 U.S.C. §2000e-5(e) (Supp. V 1975). If the aggrieved party first files his charge with an appropriate state agency, he has 300 days from the date of the discriminatory act, or 30 days from receiving notice that the state agency has terminated proceedings, whichever is earlier, to file his charge with the EEOC.

[14]*Id.*

"Congress did express concern for the need of time limitations in the fair operation of the Act, but that concern was directed entirely to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator . . ."

. . .

"The fact that the only statute of limitations discussions in Congress were directed to the period immediately preceding the filing of an initial charge is wholly consistent with the Act's overall enforcement structure—a sequential series of steps beginning with the filing of a charge with the EEOC. Within this procedural framework, the benchmark, for purposes of a statute of limitations, is not the last phase of the multistage scheme, but the commencement of the proceeding before the administrative body." *Occidental Life Insurance Co. v. EEOC, supra,* 432 U.S. at 371-372.

Appellant filed his charge of discrimination with the EEOC months before the 1972 amendments became effective. Therefore, Rockwell did not receive notice of the charge for about 13 months after the discriminatory act. In urging the application of a state statute of limitations, Rockwell argued that "the charge could pend before the EEOC almost indefinitely only to explode upon . . . respondent as a lawsuit." Rockwell can hardly contend that here any California statute of limitations would have given it substantially sooner notice. The shortest arguably applicable California statute of limitations provides a 1-year period for bringing an action.

We conclude that Title VII does not borrow state statutes of limitations because the time limits for filing a charge and giving notice to the employer are a Congressionally established statute of limitations. *Accord, Draper v. United States Pipe & Foundry Co.,* 527 F.2d 515, 522 (6th Cir. 1975); *Roberts v. Western Airlines,* 425 F.Supp. 416, 420 (N.D.Cal. 1976). "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." *Holmberg v. Armbrecht,* 327 U.S. 392, 395 (1946); *United Mine Workers v. Kleppe,* 561 F.2d 1258, 1260-1261 (7th Cir. 1977).

(D)

In the 1972 Amendments, Congress directed the EEOC to complete its investigation of a charge within 120 days "so far as practicable."[15] In addition, Section 706(f)(1) of Title VII as amended in 1972 provides that the EEOC must notify the aggrieved party:

(1) if the EEOC dismisses the charge as unfounded, or

(2) if within 180 days the EEOC has not commenced an action, or

(3) if within 180 days the EEOC has been unable to complete a conciliation agreement.

The aggrieved party has 90 days after "such notice" within which to file an action.[16]

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[15]Section 706(b), 42 U.S.C. §2000e-5(b) (Supp.V 1975).

[16]Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1) (Supp.V 1975).

It may be that Congress designed Section 706(f)(1) to give additional protection to the employer by directing the EEOC to issue a "Right to Sue Letter" no later than 180 days after the charge was filed.[17] But the Courts have uniformly held that the 90-day period does not begin to run until the aggrieved party learns of his right to bring an action. *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282, 1286-1287 (9th Cir. 1977); *DeMatteis v. Kodak*, 520 F.2d 409, 410-411 (2nd Cir. 1974); *Garner v. E.I. Du Pont De Nemours & Co.*, 538 F.2d 611, 614-615 (4th Cir. 1976); *Zambuto v. American Telephone & Telegraph Co.*, 544 F.2d 1333, 1336 (5th Cir. 1977); *Turner v. Texas Instruments, Inc.*, 556 F.2d 1349, 1351 (5th Cir. 1977).

These decisions reflect an awareness that:

> ". . . Title VII, as established by Congress, relies upon laymen, operating without legal assistance, to initiate both administrative complaints and lawsuits. Congress did not intend that such laymen, not schooled in the finer points of legal procedure, be presumed to know exactly what procedural step they must next take in order to perfect their claims . . ." *Mahroom v. Hook*, 563 F.2d 1369, 1375 (9th Cir. 1977).

It would be inconsistent with Title VII to hold that an aggrieved party who pursued his claim as diligently as appellant loses his right to file an action

[17]An EEOC regulation provides that if, after 180 days, the EEOC has not acted on a charge, the EEOC nevertheless will not issue a "Right to Sue Letter" unless the aggrieved party asks for one. 29 C.F.R. §1601.25b (1977).

because, unknown to him, the state statute of limitations had run.[18]

The judgment dismissing the Title VII claim is reversed.

III) *The Section 1981 Claim*

The District Court dismissed appellant's §1981 claim on the ground that it was barred by California's statute of limitations.

Appellant contends that the District Court erred in giving *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) retroactive effect. He argues that under the law before *Johnson*, the timely filing of a charge under Title VII with the EEOC tolled the state statute of limitations applicable to the §1981 claim based on the same facts. E.g., *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971).

In *Johnson*, the Supreme Court came to the opposite conclusion. It determined that Title VII and §1981 provide "separate, distinct, and independent" remedies for employment discrimination. 421 U.S. at 460. It concluded that an aggrieved party abandons his §1981 claim if he fails to file an action within the time set by the relevant state statute of limitations.

[18]"The Commission is expected, at the commencement and at other appropriate stages of the proceedings, to fully notify the aggrieved party in clear and understandable fashion of the various procedural rights and steps open to him. Too often a person files a charge but then blunders along, lost in the bureaucratic process." S.Rep. No. 92-415, 92nd Cong., 1st Sess. at 27 (1971).

In *Johnson*, the Court applied its ruling to the facts of that case, even though the ruling denied the petitioner any relief. Here, application of the rule announced in *Johnson* leaves appellant an alternative remedy under Title VII.

Generally a judicial decision which announces a new rule will not be applied retroactively unless retroactive application will promote the purpose of the rule and produce an equitable result. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971).

Under these criteria, the Fifth Circuit Court in a thorough and well reasoned opinion held that *Johnson* applies retroactively even though *Johnson* has overruled clear precedent. *Williams v. Phil Rich Fan Manufacturing Co.*, 552 F.2d 596 (5th Cir. 1977).

In this Circuit, there is no such precedent. We conclude that *Johnson* applies to appellant's case.

Appellant filed this action in which he asserted his §1981 claim more than 5 years after the discriminatory act. Under any applicable California statute of limitations,[19] his action is barred.

The District Court's dismissal of the Title VII claim is reversed, and the dismissal of the §1981 claim is affirmed.

REVERSED AND REMANDED

[19]Section 340(3) of the California Code of Civil Procedure provides a 1-year period of limitation for "injury to . . . one caused by the wrongful act of another . . ." Section 338(1) provides a 3-year period for "an action upon a liability created by statute, other than a penalty or forfeiture". This provision has been applied to employment discrimination actions under 42 U.S.C. §1983. E.g., *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066 (9th Cir. 1978). Section 343 provides a 4-year period for all actions not governed by other statutes of limitations. See *Reed v. Hutto*, 486 F.2d 534, 537 n.2 (8th Cir. 1973) (analysis of law governing selection of appropriate state statute of limitations).

Kirk v. Rockwell International—No. 77-2640

HUFSTEDLER, Circuit Judge, concurring specially:

Although I agree with the result reached by the majority, I cannot concur with the reasoning. The majority opinion's discussion of *Johnson v. Railway Express Co.* (1975) 421 U.S. 454, assumes that judicial decisions announcing a new application of a statutory rule will not ordinarily be applied retroactively. That assumption is directly contrary to controlling authority. I strongly disagree with the majority's *dictum* to the effect that 42 U.S.C. § 2000e-5(f)(1) may require the EEOC to issue right-to-sue letters within 180 days of the filing of a complaint. That *dictum* is in conflict with controlling authority and the *dictum* is also in conflict with the statutory scheme for reasons that I hereafter describe. Finally, I express my views on the application of state statutes of limitations to Title VII because the existing law needs clarification that is not supplied by the majority opinion.

Kirk is a white man who seeks to sue his employer, Rockwell International Corporation (Rockwell), for alleged racial discrimination in demoting him from a professional to a non-professional job rank in February, 1971. The essence of Kirk's claim is that Rockwell systematically disadvantaged whites in order to favor minorities when it reduced personnel in 1971. Kirk timely filed a complaint of discrimination with the federal Equal Employment Opportunity Commission (EEOC),[2] which first referred the matter to the Cali-

[2]Under the version of Title VII then in effect, Kirk was required to file a complaint with the EEOC within 90 days of the alleged discrimination. He filed on April 27, 1971, approximately 70 days after the act of February 17, 1971, he challenges.

fornia Fair Employment Practices Commission and then assumed jurisdiction on May 26, 1971, when it failed to act. Notice of the charge was given to Rockwell on March 30, 1972, by the EEOC, in compliance with recently enacted amendments to Title VII.[3] Despite frequent inquiries by Kirk, no further action was taken by the EEOC until August, 1976.[4] Kirk then first learned that he could demand a "right to sue" letter and did so, receiving the letter on August 17, 1976, with its notification that the EEOC had not found reasonable cause to believe his charge was true, but informing him that he could bring a civil action within 90 days of its receipt. Kirk thereupon hired counsel[5] who brought this action within the 90-day period, on

[3]The 1972 amendments to Title VII require that notice to the employer be given within 10 days of the filing of the complaint by the aggrieved individual. (42 U.S.C. § 2000e-5(b) (1972). *See* Occidental Life Ins. Co. v. EEOC, *supra,* 432 U.S. at 371-72 & n.30.) The requirement was made retroactive to pending cases, and they were deemed filed in accordance with the 1972 provisions. (Int'l. Union of Elect., Radio & Machine Workers, Local 790 v. Robbins & Meyers, Inc. (1976) 429 U.S. 229, 241-44; *see also* Davis v. Valley Dist. Co. (9th Cir. 1975) 522 F.2d 827, 830-32.) Thus, while actual notice to Rockwell came over one year after the alleged discrimination, we treat the case as if the notice issued within 10 days of the filing of Kirk's complaint as is now mandated by Title VII. Under the prior version of the statute, the EEOC was required to give the employer a copy of the charge but no time period was specified. (*See* 42 U.S.C. § 2000e-5(a) (1970) (amended 1972).)

[4]Rockwell concedes that Kirk complied in all respects with Title VII's provisions and diligently attempted to obtain prompt EEOC action on his complaint.

[5]Prior to this time Kirk, a non-lawyer, represented himself and received no legal advice. He was unaware that he could demand a right to sue letter before August, 1976. (*See* Mahroom v. Hook (9th Cir. 1977) 563 F.2d 1369, 1375 ("Congress did not intend that such laymen, not schooled in the finer points of legal procedure, be presumed to know exactly what procedural step they must next take in order to perfect their claims.").)

November 8, 1976, suing both under Title VII and under 42 U.S.C. § 1981. The district court granted Rockwell's motion to dismiss the complaint on the ground that California statutes of limitation applied to bar both claims due to the five and one-half-year hiatus between Kirk's demotion and the filing of the action. (*Kirk v. Rockwell International Corp.* (C.D. Cal. 1977) 432 F. Supp. 627, 628-29.)

I

Johnson v. Railway Express Agency, supra, held that state statutes of limitation would be "borrowed" to fill the limitation gap left in Section 1981. (421 U.S. at 462. *See Runyon v. McCrary* (1976) 427 U.S. 160, 179-82; *Chevron Oil Co. v. Huson* (1971) 404 U.S. 97, 101-05; *Holmberg v. Armbrecht* (1946) 327 U.S. 392, 395; *International Union of Operating Engineers v. Fischbach & Moore, Inc.* (9th 1965) 350 F.2d 936, 938-39; *Horn v. Bailie* (9th Cir. 1962) 309 F.2d 167, 168; *Smith v. Cremins* (9th Cir. 1962) 308 F.2d 187, 188-90 & nn. 9, 12. *See generally* Note, Federal Statutes Without Limitation Periods, 53 Colum. L. Rev. 68 (1953).) *Johnson* also held that Section 1981 was a remedial alternative to Title VII and that filing a complaint with the EEOC under Title VII did not toll limitations applicable to a Section 1981 action. (421 U.S. at 459-61, 465-66.)

If *Johnson* applies to Kirk's case, his Section 1981 action is barred under any applicable California limitations statute because more than five years elapsed after the alleged discriminatory acts.[6] He argues that

[6]The longest period potentially applicable to 42 U.S.C. 1981 actions is three years. (Cal. Code Civ. Proc. § 338(1) (actions

(This footnote is continued on next page)

the applicable California limitations period should be deemed to run only from the date *Johnson* came down and that this action is timely as filed within one year of that date.

None of the exceptions to the general rule that judicial decisions are both retrospective and prospective is applicable here. (*See, e.g., Linkletter v. Walker* (1965) 381 U.S. 618, 622-29; *National Ass'n of Broadcasters v. FCC* (D.C. Cir. 1976) 553 F.2d 1118, 1130-32; *United States v. Fitzgerald* (7th Cir. 1976) 545 F.2d 578, 581-82; *People v. The Italian Motorship Ilice* (9th Cir. 1976) 534 F.2d 836, 840-41 n.1.) Both intervening decisions and statutory changes will be applied to all cases *sub judice* "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." (*Bradley v. School Board of the City of Richmond* (1974) 416 U.S. 696, 710-21. *Accord J.A. Jones Construction Co. v. Plumbers and Pipefitters Local* 598 (9th Cir. 1978) 568 F.2d 1292, 1295; *Wasserman v. Municipal Court of Alhambra Judicial District* (9th Cir. 1976) 543 F.2d 723.) Nothing in *Johnson* suggests that the Court limited the application of its decision. Other Circuits have routinely applied *Johnson* to bar actions which arose prior to it. (*Martin v. Georgia-Pacific*

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for liability created by statute).) We have no occasion to decide whether a shorter, one-year statute of limitations might apply (*id.* § 340(3) (tort actions)) because the delay here was five and one-half years. (*But see* Shouse v. Pierce County (9th Cir. 1977) 559 F.2d 1142, 1146-47 ("the state limitations statute that we have repeatedly borrowed [in civil rights actions] is a statute that prescribes the limitations for actions founded on a liability created by statute."); *see also* Bradshaw v. Zoological Soc. of San Diego (9th Cir. 1978) ..... F.2d ..... [slip op'n at 385]; Briley v. California (9th Cir. 1977) 564 F.2d 849, 854, both noting § 338(1) applies in § 1983 actions.

Corp. (8th Cir. 1977) 568 F.2d 58; *Graffals Gonzalez v. Garcia Santiago* (1st Cir. 1977) 550 F.2d 687, 688; *Patterson v. American Tobacco Co.* (4th Cir. 1976) 535 F.2d 257, 275; *Fine v. City of New York* (2d Cir. 1975) 529 F.2d 70, 76-77.)

Kirk argues that his case falls within the limited set of circumstances in which a decision should not be given retrospective application because it is a radical departure from prior law and falls inequitably upon parties who relied upon the old rule. (*E.g., Chevron Oil Co. v. Huson, supra,* 404 U.S. at 105-15. *Cipriano v. City of Houma* (1969) 395 U.S. 701, 706; *Bunker v. Wise* (9th Cir. 1977) 550 F.2d 1155, 1156-58.) *Johnson* does not fall within the rationale of *Chevron Oil Co. v. Huson, supra.* Although courts in the Fifth and District of Columbia Circuits had held prior to *Johnson* that filing with the EEOC under Title VII tolled the Section 1981 statute of limitations (*see* 421 U.S. at 457 & n.4), that rule was never adopted by this Circuit. Rather, we have long adopted state statutes of limitation in civil rights case. (*See, e.g., Smith v. Cremins, supra;* cases cited in n.6, *supra.*) A litigant might have hoped that this court would follow the Fifth and District of Columbia Circuits in tolling the state statute of limitation in Section 1981 actions, but he could not have relied upon those cases as dispositive here. Moreover, the Fifth Circuit itself has held that litigants in its courts could not be shielded from the ordinary jurisprudential effect of *Johnson* because of its former rule to the contrary. (*Williams v. Phil Rich Fan Manufacturing Co.* (5th Cir. 1977) 552 F.2d 596, 598-600.) I agree with the Fifth Circuit that the *Johnson* decision should not be given limited applicability.

II

Private individuals aggrieved by employer practices may bring a civil action to enforce these rights under Title VII, if they comply with certain statutory requisites. They must first file a complaint with the EEOC within 180 days of the alleged discrimination (42 U.S.C. § 2000e-5(e)) and the EEOC must thereupon notify the employer within 10 days and conduct an investigation of the charge. (*Id.* § 2000e-5(b).) Longer periods for filing the complaint—up to 300 days—are available to employees who live in states which have statutes comparable to Title VII, because the statute requires the EEOC to defer acquiring jurisdiction until the state is given the initial opportunity to act. (*Id.* § 2000e-5(c)-(e).) Once the EEOC has assumed jurisdiction of the controversy, the individual's ability to act is suspended to avoid duplication of proceedings. (*See H.R. Rep. No. 92-238,* 92d Cong., 1st Sess. reprinted in 1971 U.S. Code Cong. & Admin. News 2137, 2148 (hereinafter cited as "*Committee Report*").) The EEOC may dismiss the charge, as it did here, "because there is not reasonable cause to believe that the charge is true" (42 U.S.C. § 2000e-5(b)) or, if it finds to the contrary, it may attempt to attain conciliation and settlement through administrative channels or seek to enforce Title VII in the courts. (*Id.* § 2000e-5(b), (f), (g), & (j). *See Occidental Life Insurance Co. of California v. EEOC* (1977) 432 U.S. 355, 358-66.) If the EEOC is unable or unwilling to resolve the controversy and if no action has occurred after 180 days and the complainant wishes to withdraw the matter from EEOC jurisdiction, the EEOC issues a so-called "right to sue letter." Issuance of this letter terminates EEOC jurisdiction and its

ability to act and "reactivates" the individual's right to bring a civil action under Title VII. (*Committee Report, supra,* 1971 U.S. Code Cong. & Admin. News at 2148.) If the individual does not file suit within 90 days, however, the right is extinguished. (*International Union of Electrical, Radio & Machine Workers, Local 790 v. Robbins & Meyers, Inc.* (1976) 429 U.S. 229, 240; *Lynn v. Western Gillette, Inc.* (9th Cir. 1977) 564 F.2d 1282; *Mahroom v. Hook* (9th Cir. 1977) 563 F.2d 1369, 1374-75.)

A private individual's civil action under Title VII thus requires the timely filing of the complaint with the EEOC and the filing of a civil action in the federal district court within 90 days of notification of the termination of EEOC proceedings through receipt of a right to sue letter. (*See id.* (90-day period commences on date of actual receipt of the letter).) In the interim, the matter is committed to the EEOC for administrative processing, and the Supreme Court in *Occidental Life Insurance Co., supra,* affirmed this court's holding that such processing was subject to no time limitations. (432 U.S. at 372-73, *aff'ing* 535 F.2d at 536-40.)

Rockwell contends that any statute which gives a private individual a right to sue another must contain an absolute time limitation period, running from the date of the accrual of the cause of action to the date of the filing of the complaint in court. As Title VII contains no such overall time limitation, it says that a limitation period must be borrowed from state law to fill the "gap" as in *Johnson v. Railway Express Co., supra,* 421 U.S. at 462-64. (*See also* cases cited in Section I p. 3, *supra.*) Absent such a limitation

period, it argues, defendants will be subject to undue burdens in defending stale claims. Kirk and the EEOC as *amicus curiae* argue to the contrary that state limitations periods have no role to play because Title VII contains a complete set of limitations periods. Alternatively, they argue that if such statutes do apply, they should be deemed tolled during the pendency of EEOC administrative proceedings.

The question presented was explicitly left open in this court's decision in *Occidental Life Insurance, supra,* 535 F.2d at 537 n.6, and the district courts of this Circuit have divided on its resolution. (*Compare Piva v. Xerox Corp.* (N.D. Cal. 1974) 376 F. Supp. 242, 244-45 (state statutes of limitation do not apply) *with* this case below, 432 F. Supp. 627, 628-29; *Jarrett v. North American Rockwell Corp., Los Angeles Div.* (C.D. Cal. 1977) 433 F. Supp. 275, 276-77; *Clayton v. McDonnell Douglas Corp.* (C.D. Cal. 1976) 419 F. Supp. 28, 29-30 (state statutes of limitation do apply).) One circuit court has decided the issue—the Sixth Circuit in *Draper v. United States Pipe & Foundry Co.* (6th Cir. 1976) 527 F.2d 515, 522. The *Draper* court stated simply that "Title VII establishes its own statute of limitations, and state law is irrelevant in determining whether a private litigant has lost his right of action under Title VII through the passage of time." (*Id.*) It relied, *inter alia,* upon the decision of the district court for the Northern District of California in *Piva v. Xerox Corp., supra.*

District courts outside this Circuit have uniformly held that state statutes of limitation do not bar private litigants' Title VII actions which otherwise comply with its filing provisions. (*Pierce v. Catalytic, Inc.* (E.D. Pa. 1977) 430 F. Supp. 1180, 1183; *Askins v. Imperial*

Reading Corp. (W.D. Va. 1976) 420 F. Supp. 413, 416; *Allen v. Amalgamated Transit Union, Local 788* (E.D. Mo. 1976) 415 F. Supp. 662, 666-67 (*semble*); *Pittman v. Anaconda Wire & Cable Co.* (E.D. N.C. 1976) 408 F. Supp. 286, 293; *Beckum v. Tennessee Hotel* (W.D. Tenn. 1971) 341 F. Supp. 991, 994; *Jackson v. Cutter Laboratories* (E.D. Tenn. 1970) 338 F. Supp. 882, 885.)

I agree with the Sixth Circuit and the district courts which have held that Title VII's time provisions fully define the steps which must be taken by a Title VII litigant to preserve his or her right to sue. State statutes of limitation are not borrowed because there is no gap to fill and applying them to private individuals would interfere with the effective administration of Title VII for reasons stated in *Occidental Life Insurance, supra.*

In *Occidental Life Insurance Co. v. EEOC, supra,* the Supreme Court held that the requirements that an employee file a complaint with the EEOC within a limited period of time and that the EEOC then notify the employer of the charge were "the benchmark, for purposes of a statute of limitation." (432 U.S. at 371-72.) Once these steps have been taken, Title VII imposes no limitation on the amount of time elapsing between the EEOC's assumption of jurisdiction and the filing by the EEOC of a judicial enforcement action. (*Id.* at 372.) Although this means that "the EEOC is not bound by any limitations period at all" (*id.* at 373 (Rehnquist, J., *dissenting*)), the Court declined to borrow state statutes of limitations.

> "[T]he Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State

> legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. 'Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.' *Johnson v. Railway Express Agency*, 421 U.S. 454, 465. State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." 432 U.S. at 367.

The Court concluded that application of state law would frustrate the federal scheme. The Court read the legislative history of the 1972 amendments to Title VII as reflecting congressional awareness of the lengthy delays involved in EEOC proceedings and concluded that Congress had made a positive decision to permit such delay in the interest of obtaining the other economies which could be achieved by using this method of dispute resolution—reduced litigation costs, conservation of scarce judicial resources, and the establishment of national standards for employer practices. (*Id.* at 369-71. *See Committee Report, supra,* 1971 U.S. Code Cong. & Admin. News at 2146-47.[7])

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[7]"Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases. * * * The sorting out of the complexities surrounding employment discrimination can give rise to enormous expenditures of judicial resources in already overburdened Federal district courts. * * * Moreover, administrative tribunals are less subject to technical rules governing such matters as pleadings and motion practice—which afford opportunities for dilatory tactics—and are less constrained by formal rules of evidence—which give rise to a lengthier (and more costly) process of proof." (*Id.* at 2146.)

In *Occidental*, the Court also examined the meaning of 42 U.S.C. §2000e-5(f)(1) which provides in pertinent part:

> ". . . if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference . . . , whichever is later, the Commission has not filed a civil action under this section . . . [nor] entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved [and issue a right to sue letter]."

Although the statute appears to mandate that the EEOC divest itself of jurisdiction, the Court agreed with the circuit courts which had concluded that the provision merely entitled the complainant to withdraw the charge from EEOC jurisdiction if he or she wished to pursue a civil action rather than await the outcome of EEOC proceedings. (432 U.S. at 360-66 & n.21. *Accord EEOC v. Wilson & Co.* (10th Cir. 1976) 535 F.2d 1213, 1215; *Williams v. Southern Union Gas Co.* (10th Cir. 1976) 529 F.2d 483, 487; *Tuft v. McDonnell Douglas Corp.* (8th Cir. 1975) 517 F.2d 1301, 1305-07; *EEOC v. Kimberly-Clark Corp.* (6th Cir. 1975) 511 F.2d 1352; *EEOC v. Louisville & Nashville RR. Co.* (5th Cir. 1974) 505 F.2d 610; *EEOC v. Cleveland Mills Co.* (4th Cir 1974) 502 F.2d 153.)

The same courts have concluded that this provision merely gives the complainant the option of extricating the charge from the "administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process" (*Committee Report, supra,*

1971 U.S. Code Cong. & Admin. News at 2147-48; noting delays of 2-3 years), but it does not require that the complainant do so. (*E.g., Occidental Life Insurance Co. v. EEOC, supra,* 432 U.S. at 362-66; *Tuft v. McDonnell Douglas Corp., supra,* 517 F.2d at 1305-08.) This court and others have also rejected the argument that this 180-day period combined with the pre- and post-filing time periods comprises an overall limitation period on a private individual's civil action under Title VII. (*Cunningham v. Litton Industries* (9th Cir. 1969) 413 F.2d 887. *Accord Miller v. International Paper Co.* (5th Cir. 1969) 408 F.2d 283, 285-87; *Choate v. Caterpillar Tractor Co.* (7th Cir. 1968) 402 F.2d 357, 361.) We stated in *Cunningham* that "the . . . period within which suit may be filed in federal district court begins to run when the aggrieved party receives notice . . . from the EEOC, regardless of the period of time the Commission has taken to process the charge." (413 F.2d at 890.)

If Rockwell were right, a complainant would be forced to demand a right to sue letter and to abandon EEOC jurisdiction to avoid destruction of the complainant's right to a civil action whenever a state limitations statute threatened to expire. That interpretation would frustrate the congressional scheme of Title VII. Congress established a carefully integrated set of time periods keyed to the procedural steps of the statute. (*See Machlin v. Spector Freight Systems, Inc.* (D.C. Cir. 1973) 478 F.2d 979, 986 (the Act "embodies a clearly defined federal policy of deferring action in federal court until a charge has been filed with the agency and an opportunity afforded . . . to attempt private settlement." Therefore EEOC "clearance" is necessary before a private party can file suit).)[8] As *Johnson v. Railway Express Agency, supra,* explains, Congress intended to offer an aggrieved employee a variety of remedies short of litigation, with resort to judicial process only when these alternative remedies had failed. Interruption of EEOC jurisdiction to comply with state statutes of limitation is inconsistent with the congressional scheme.[9] As the Court pointed out in *Holmberg v. Armbrecht, supra,* 327 U.S. at 395: "[When] Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The congressional statute of limitations is definitive."[10]

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[8]As the completion of administrative proceedings are a jurisdictional requisite to the existence of the individual's right to sue, it would appear that any state limitation period would be tolled during the pendency of EEOC proceedings in any event. (*Cf.* Chambers v. Omaha Public School District (8th Cir. 1976) 536 F.2d 222, 230-31.) In view of our holding here, we have no need to decide this issue.

[9]The suggestion that a precautionary suit be filed and then delayed pending EEOC deliberations as the Court suggested in Johnson v. Railway Express, supra, 421 U.S. at 465, is untenable. There is no right to sue and hence no cause of action under Title VII until Title VII proceedings are over. Thus no civil action may be filed unless EEOC jurisdiction ceases and the accommodation suggested in *Johnson* is not available. Moreover, if it were, it would involve the already overburdened district courts in untold nuisance and confusion to attain an end adequately served by Title VII's own requirement of prompt notice to the employer and undercut a major purpose of the creation of the EEOC—to free the courts of the need for adjudication of these claims by resolving most through an administrative process.

[10]*See also* Occidental Life Ins. Co. v. EEOC, *supra,* 432 U.S. at 381 n.5. In dissenting, Mr. Justice Rehnquist suggested that the 90-day period was a form of limitations period applying only to individual actions and thus concluded that the absence of such a provision as to EEOC enforcement actions suggested a gap existed which should be filled by a state statute of limitations. To the same effect is EEOC v. Kimberly-Clark Corp. (6th Cir. 1975) 511 F.2d 1352, 1357.

Contrary to Rockwell's argument, our interpretation of Title VII does not thwart state policy against the prosecution of stale claims and the use of stale evidence. Title VII requires timely filing and notice before the institution of administrative proceedings. (*Occidental Life Insurance Co. v. EEOC, supra,* 432 U.S. at 371-72 & n.30.) After an employer is notified that it is the subject of an EEOC investigation, the employer knows that the claim is alive and ample opportunity exists to preserve evidence, to conduct its own investigation, and to prepare itself for potential litigation.[11] The state's interest in prompt resolution of employer-employee conflicts involving discrimination is adequately served under Title VII by the deferral provisions, permitting the *locus in quo* to try to resolve the controversy before EEOC jurisdiction is assumed.[12]

Title VII adequately accommodates the competing interests of the employer and employee. The employer receives prompt notice of the pendency of a Title VII charge and is assured that if the EEOC decides not to act, the employee must sue promptly or be barred from recovery. The employee is given the opportunity to have the charge resolved administratively, but also

[11]*See also* EEOC v. Occidental Life Ins. Co., *supra,* 535 F.2d at 540; Cunningham v. Litton Industries, *supra,* 413 F.2d at 891, both suggesting that in certain circumstances the employer might be able to precipitate adjudication.

[12]42 U.S.C. § 2000e-5(c)-(e). *See* Davis v. Valley Distributing Co. (9th Cir. 1975) 522 F.2d 827, 832 n.12 ("this deference . . . is to take the form of an *opportunity* to act;" compliance with state deadlines is not a precondition to EEOC jurisdiction or later civil suit.) *Accord* Olson v. Rembrandt Printing Co. (8th Cir. 1975) 511 F.2d 1228, 1232 ("state limitations period cannot govern the efficacy of the federal right"). *See also* Chambers v. Omaha Public School Dist. (8th Cir. 1976) 536 F.2d 222. Thus in deference to California law, its Fair Employment Practices Commission was given the first opportunity to act in this case.

obtains a right to sue if the EEOC is unable or unwilling to resolve the problem. If any abuses do occur, the court in exercise of its equitable powers may restrict the granting of relief. (432 U.S. at 373. *See also EEOC v. South Carolina Nat'l Bank* (4th Cir. 1977) 562 F.2d 329, 333.) No delay attributable to Kirk is present in this case, and he is entitled to adjudicate his Title VII claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THE VIEWS HEREIN EXPRESSED.

APPENDIX B.

David L. Kirk, Plaintiff, v. Rockwell International Corporation, Defendant. No. 76-3510-AAH.

United States District Court, C. D. California. June 3, 1977.

Employee brought civil rights action against employer alleging discrimination on the basis of his race, and employer moved to dismiss. The District Court, Hauk, J., held that federal civil rights action which was instituted approximately five years and nine months from date of alleged discrimination was time barred under either California's one year statute of limitations applicable to tort liability or California's three-year statute of limitations applicable to actions based upon a liability created by statute.

Motion to dismiss granted.

Charles E. Hart, 3d, Robert N. Kohn by David J. Shapiro, El Segundo, Cal., for defendant Rockwell Intern. Corp.

Silver & Wells by Stephen H. Silver, Los Angeles, Cal., for plaintiff David L. Kirk.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HAUK, District Judge.

The above-entitled matter having come on to be heard on Defendant Rockwell International Corporation's (hereafter "Rockwell") Motion to Dismiss plaintiff's cause of action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, on April 4, 1977, before the Honorable A. Andrew Hauk, United States District

Judge, the Court having considered all the documents filed with respect to said Motion, the pleadings, memoranda, and having heard and considered the arguments of counsel; and the Court being fully advised in the premises, now makes the Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiff is a Caucasian male employee of Rockwell. Plaintiff was initially hired by Rockwell on or about April 12, 1949, at its Autonetics Division in Anaheim, California, and is currently employed at Rockwell's Autonetics Division in Anaheim, California.

2. Prior to February 14, 1971, plaintiff was employed in a salaried position as a Member, Quality and Reliability Staff II. Subsequent to February 14, 1971, plaintiff had been employed in a nonsalaried position as Inspector-Material Review, Senior.

3. In the immediate time frame of February 14, 1971, the number of salaried employees in the position of Member, Quality and Reliability Staff II was reduced for reasons necessitated by business and economic conditions.

4. On or about April 27, 1971, plaintiff filed a charge of alleged discrimination against Rockwell with the Equal Employment Opportunity Commission (hereafter "EEOC"). The charge alleged discrimination on the basis of his race, Caucasian. Plaintiff had also filed a charge with the Fair Employment Practice Commission (hereafter "FEPC") of the State of California. On or about May 26, 1971, the FEPC declined to proceed in the matter, at which time the EEOC assumed

jurisdiction. On or about August 17, 1976, the EEOC issued a Letter of Determination to the plaintiff indicating that it had not found reasonable cause to believe that the charge of employment discrimination was true, and that it was terminating its processes.

5. On November 8, 1976, plaintiff's counsel filed this cause of action with this Court pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. §§2200 *et seq.*) (hereafter "Title VII") and 42 U.S. C.A. § 1981.

6. On December 13, 1976, defendant filed with this Court a Motion to Dismiss plaintiff's cause of action on the basis that this Court lacked subject matter jurisdiction and that plaintiff's cause of action failed to state a claim upon which relief can be granted, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. On March 25, 1977, plaintiff filed with this Court Points and Authorities in opposition to defendant's Motion to Dismiss. On March 31, 1977, defendant filed with this Court a Response to plaintiff's Points and Authorities and affidavit opposing defendant's Motion to Dismiss. On April 1, 1977, plaintiff filed with this Court a Reply Memorandum and an affidavit of plaintiff's counsel opposing defendant's Motion to Dismiss.

7. Any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. Defendant Rockwell is an employer within the meaning of Sections 701(b) and 703(a) of Title VII (42 U.S.C.A. §§ 2000e and 2000e-2).

2. In private civil rights actions, where Congress has not provided a statute of limitations, the most analogous state statute of limitations will be applied to the federal action. *EEOC v. Occidental Life Ins. Co.*, 535 F.2d 533 (1976), cert. granted, 429 U.S. 1022, 97 S.Ct. 638, 50 L.Ed.2d 623, 1976. See also *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975).

3. Congress has not provided an overall period of limitations for Title VII actions and § 1981 actions. Therefore, the most applicable state statute of limitations must apply.

4. The most analogous California state statute of limitations is either the one-year statute of limitations with regard to tort liability (prescribed in § 340(3) of the California Code of Civil Procedure (hereafter "CCP")), or the three-year statute of limitations with regard to actions upon a liability created by statute (prescribed in CCP § 338(1)).

5. Inasmuch as this cause of action was instituted approximately five years and nine months from the alleged date of discrimination, this Court need not determine whether the applicable state statute of limitations with regard to such actions is that prescribed in CCP § 340(3) or CCP § 338(1), as this case is time-barred in any event. *Clayton v. McDonnell Douglas Corp.*, 419 F.Supp. 28 (C.D. Cal. 1976), on appeal, No. 76-3198 (C.A. 9 1977).

6. The applicable state statute of limitations is not tolled merely because the plaintiff filed a charge with the EEOC, since, *inter alia*, such tolling principle would totally eliminate any overall period of limitations in

such cases. *Johnson, supra*; 421 U.S. pp. 455, 456, 95 S.Ct. 1716.

7. For the foregoing reasons, this Court lacks subject matter jurisdiction, and the plaintiff has failed to state a claim upon which relief can be granted. Accordingly, this case is dismissed for the reason that it was not timely instituted and is now time-barred by any applicable California state statute of limitations.

8. Any Finding of Fact deemed to be a Conclusion of Law is hereby incorporated into these Conclusions of Law.

LET JUDGMENT BE ENTERED ACCORDINGLY.